United States Court of Appeals

for the Second Circuit



BRIEF FOR APPELLEE

76-1452

To be argued by
R. A. LEVITES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1452

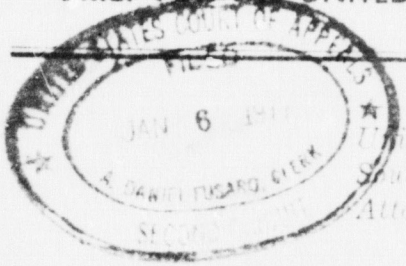
BRIEF FOR THE UNITED STATES OF AMERICA

UNITED STATES OF AMERICA,
Appellee,

—v.—

LOUIS SORRENTINO,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1452

UNITED STATES OF AMERICA,

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—v.—

LOUIS SORRENTINO,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Louis Sorrentino appeals from a judgment of conviction entered on September 30, 1976, in the United States District Court for the Southern District of New York, after a two-day trial before the Honorable Edward Weinfeld, United States District Judge, and a jury.

Indictment 76 Cr. 626, filed in two counts on July 6, 1976, charged Sorrentino, Richard Tate a/k/a Alfred Hunter, and Albert Green with having conspired to distribute cocaine in violation of Title 21, United States Code, Section 846, and with having distributed and possessed with the intent to distribute approximately 55.94 grams of cocaine in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).

Trial against Sorrentino began on September 8, 1976.* On September 9, 1976, the jury convicted Louis Sorrentino on both counts.

On September 30, 1976, Judge Weinfeld sentenced Sorrentino to concurrent terms of three years imprisonment on both counts and a three-year special parole term to commence upon the expiration of his confinement.

Sorrentino is presently at liberty on bail pending this appeal.

Statement of Facts

The Government's Case

A. Summary

The Government's proof overwhelmingly demonstrated the defendant Louis Sorrentino's membership in a narcotics distribution network. Beginning in late 1974 Sorrentino initially sold cocaine to Richard Tate for his personal use and subsequently, in 1975, provided Tate with cocaine on a consignment basis for sale to others.** Ultimately, the conspiracy was joined by Tate's roommate, Albert Green. The proof at trial centered around Sorrentino's role in a sale of approximately two ounces of cocaine on February 12, 1976.

Tate testified for the Government. His testimony was corroborated by Steven Newman, a confidential in-

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* Richard Tate pleaded guilty to Count One and was sentenced before trial to a period of eighteen months imprisonment and three years special parole. Albert Green was a fugitive and his whereabouts were unknown at the time of trial.

** Tate was also known as Alfred Hunter and is referred to in Sorrentino's brief as Hunter.

formant working with the New York Drug Enforcement Task Force, and by Detectives John Copeland and Charles J. Rinaldi, both of the New York City Police Department, who conducted undercover and surveillance investigation of the conspiracy. Police Officer Frederick H. Bade, assigned to the Organized Crime Control Bureau of the Police Department, also testified with respect to the actions of Sorrentino.

B. Sorrentino Begins to Deal in Cocaine with Tate

In late 1974, Tate met with Louis Sorrentino, the manager of the San Souci Bar in Manhattan, and purchased $50 worth of cocaine from him in the bar. (Tr. 38, 94).* Thereafter, Tate made many additional purchases of cocaine valued at up to $300 and introduced other persons to Sorrentino at the San Souci to facilitate their acquisition of cocaine. (Tr. 39-40, 78; GX 2).

Sometime in 1975, approximately eight or nine months after his initial sale to Tate in late 1974, Sorrentino began to consign quantities of cocaine to Tate for sale by him to others. Tate would sell the narcotics and then returned the proceeds to Sorrentino who would then pay Tate for his services with quantities of cocaine. This arrangement was temporarily disrupted for a time, because Tate withheld some money from Sorrentino and because of the inferior quality of Sorrentino's narcotics. (Tr. 42). Sometime in late 1975, Tate decided to join the YMCA to get away from drugs altogether.

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* The abbreviation "Tr." refers to the trial transcript; "GX" refers to Government exhibits introduced at trial; and "Br." refers to Sorrentino's brief on appeal.

C. Tate and Green Meet Newman, and Green Joins the Conspiracy

In December of 1975, Steven Newman, the informant, met Tate at the Chez Paris Bar in Manhattan. (Tr. 14). They discussed possible purchases of cocaine. (Tr. 16).

Thereafter, early in February, 1976, Tate invited Newman to Tate's room at the Hotel Gorham on 55th Street. Tate, who was ill at the time, introduced Albert Green, who was sharing his hotel room, to Newman, as a potential source of cocaine. (Tr. 16-17, 44). Green said he knew of three or four sources for an eighth of a kilogram of cocaine. (Tr. 17).

That same day Green told Tate that he was going to call the San Souci Bar and see if he could get the cocaine from "Louie" Sorrentino. Green then placed a phone call, asked to speak to "Louie," and inquired of "Louie" about acquiring two ounces of cocaine all in the presence of Tate. After the phone call, Green told Tate that "Louie" refused to supply two ounces without payment prior to delivery and that the price of the cocaine would be more than $2,000. (Tr. 46, 71-72). After another phone call by Green to Sorrentino, however, the transaction was arranged for the next day, February 12, 1976, at 7:00 p.m. (Tr. 47).

D. The February 12, 1976 Sale

On the evening of February 12, 1976, Newman met Green and Tate at the Hotel Gorham and accompanied them to the nearby automobile of undercover Police Officer Rinaldi, who was posing as the ultimate purchaser of the cocaine. After the price and quality of the cocaine were discussed, Green told Rinaldi that the co-

caine was coming from a connection named "Louie" who owned the San Souci Bar on 52nd Street. Green also said that he was expecting a call from Louie any minute in which Louie would explain how the cocaine would be delivered. (Tr. 24, 77-79).

Green then left the car to take the call at the hotel room he shared with Tate in the Gorham, while Tate remained with Rinaldi. Tate told Rinaldi that "Louie" could obtain "anything from pills to heroin." (Tr. 79).

After a short period, Green returned to the car and asked Rinaldi to "front" the money and accompany him to 65th Street and Second Avenue to pick up the cocaine. Detective Rinaldi categorically refused to advance the money and demanded that, before the payment was made, the cocaine be brought directly to him in front of the hotel.

Green then left to go to 65th Street and Second Avenue to meet his source "Louie", and discuss Rinaldi's demands. Shortly thereafter, Tate left the car to return to the hotel room to await a call from Green. (Tr. 79-80).

Green returned approximately one-half hour later in a black Pontiac bearing a New York license plate with a number, part of which was observed to be 753-Y. (Tr. 85-86, 90). The car was driven by Sorrentino. (Tr. 90).* Sorrentinto pulled up to the curb some distance from Rinaldi's car, whereupon Green emerged from the car and walked to Rinaldi's car, where Rinaldi and Newman waited. (Tr. 28, 80). Just as Green reached Rinaldi's car, Sorrentino quickly pulled the black Pon-

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* It was later determined that the vehicle was registered to a leasing company. The company's records revealed that the car had been leased by Sorrentino. (Tr. 91; GX 2).

tiac away from the curb without putting the lights on and proceeded toward Seventh Avenue. (Tr. 86, 90).

As Green entered Rinaldi's car, he said, "I got the cocaine, my man is behind me . . ." (Tr. 80). He then produced a plastic bag containing approximately two ounces of cocaine. (Tr. 81-82, 92; GX 3). When Green handed the bag to Rinaldi, he was immediately arrested.

The Defense Case

The defendant neither testified nor presented any evidence.

ARGUMENT

POINT I

The Proof Demonstrated the Existence of a Single Conspiracy.

Sorrentino, for the first time on appeal, voices the "now routine claim" * that the indictment charged one conspiracy whereas the proof evidenced multiple conspiracies.** More specifically, Sorrentino claims that the evidence proved one conspiracy between Sorrentino and Tate which began in late 1974, from which Tate withdrew in late 1975, and another among Sorrentino, Tate and

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* *United States* v. *Head*, Dkt. No. 76-1219, slip op. 647, at 649 (2d Cir., Nov. 29, 1976). See also, *United States* v. *Panebianco*, Dkt. No. 76-1132, slip op. 119, 125 (2d Cir., Oct. 14, 1976).

** The defendant's failure to raise a claim of multiple conspiracies below constitutes a waiver of the issue. *United States* v. *Head*, *supra*, slip op. at 649; *United States* v. *Indiviglio*, 352 F.2d 276, 280 (2d Cir. 1965) (en banc), *cert. denied*, 383 U.S. 907 (1966).

Green which did not begin until February, 1976. Sorrentino argues that proof of the two conspiracies caused him substantial prejudice. This claim is meritless.

A. The Relevant Facts

Analysis of this issue is facilitated by a brief review of the relevant facts.

The Government proved that Sorrentino began to supply Tate with cocaine for his own use in late 1974. After about eight months, Sorrentino began to provide Tate with cocaine on a consignment basis for sale to third parties. Tate stopped selling cocaine on consignment briefly because the quality of the cocaine had declined. He then returned to selling, but stopped after three months when Sorrentino learned that Tate was not returning with all of the proceeds. Tate also claimed that he stopped selling because he had joined the YMCA and hoped to get away from drugs. In the words of Tate, however, he "went back once more" to obtain drugs from Sorrentino, and the result was his arrest in this case. (Tr. 37-43).

The events leading to Tate's arrest began when he introduced the informant Newman, who was inquiring as to the availability of cocaine, to Green, Tate's roommate, with the understanding that, as Tate was "under the weather," Green would attempt to arrange for the availability of the cocaine Newman wanted. (Tr. 43-44). Green agreed to do so. Green proceeded to contact Sorrentino on behalf of Newman and Tate to set up a deal for two ounces of cocaine. (Tr. 45-46). Tate then went on February 12, 1976 to the proposed scene of the transaction with Newman and Green, and met with the undercover agent in his automobile. (Tr. 48). Green left the

car to obtain the cocaine from "Louie," while Tate left to await a telephone call from Green which was to confirm the fact that Green had successfuily secured the cocaine from Sorrentino. (Tr. 49, 79-80). Green, driven by Sorrentino, returned to deliver the cocaine.

Based on this evidence, Judge Weinfeld charged the jury as follows with respect to the issue of single-multiple conspiracies:

> "The Court: The final word. While the indictment charges that the conspiracy existed from on or about the 5th day of February, 1976 and continuously up to July 7, 1976, the date of its filing, it is not essential that the government prove that the conspiracy started and ended precisely on or about those specific dates. Indeed, as I have already mentioned, the government contends that the conspiracy commenced some time in the latter part of 1975 [sic, should be 1974] and continued into the period referred to in the indictment, that is, February 5, 1976 and was in existence on February 12, 1976 when Green made the delivery to the undercover agent of cocaine which, as the government contends, he received from Sorrentino on that day.
>
> Thus, it is sufficient if you find beyond a reasonable doubt that an ongoing conspiracy continued to February 5 and beyond to February 12 and that within that period at least one of the overt acts was committed in furtherance thereof.
>
> On the other hand, if you find there was no conspiracy prior to February 5, 1976 or if there was, that Sorrentino was not a member of the conspiracy, then you will not consider any of the acts, conduct, or statement of Tate or conversations with Sorrentino prior to that day. The reason for

this is that, as I explained to you at the time I allowed Tate's hearsay testimony in evidence, that it was admitted tentatively as part of the proof to establish a conspiracy.

Thus, if one were found to exist and, further, Tate was a member, then his acts, conduct and statements in furtherance of the objectives of the conspiracy would also be binding upon all those found to be conspirators, but if there were no such conspiracy prior to February 5, 1976, then Tate acted and spoke for himself only.

Indeed, I would say if you find there was no conspiracy prior to February 5, 1976, then you should acquit Sorrentino of the conspiracy charge under count 1 since the foundation and structure of the government's case under that count rests essentially upon Tate's testimony.

What you must do is determine whether the conspiracy charged in the indictment existed. If you find that no such conspiracy existed, then you must acquit the defendant. *Even if you find that a conspiracy existed of which Sorrentnio and Tate were members but was not the one charged in the indictment, then you must acquit.*" (Tr. 151-55) (emphasis supplied.)

No exceptions were taken to Judge Weinfeld's charge. (Tr. 167).

B. The Evidence Demonstrated A Single, Continuing Conspiracy

The issue of whether the Government has discharged its obligation of demonstrating a single conspiracy is primarily a question of fact for the jury, rather than for

the trial judge or this Court, to decide. *United States* v. *Finkelstein*, 526 F.2d 517 (2d Cir. 1975), *cert. denied*, — U.S. —, 44 U.S.L.W. 3624 (May 3, 1976); *United States* v. *Torres*, 519 F.2d 723 (2d Cir.), *cert. denied*, 423 U.S. 1019 (1975); *United States* v. *Calabro*, 449 F.2d 885, 893 (2d Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); *United States* v. *Dardi*, 330 F.2d 316, 327 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964); *United States* v. *Crosby*, 294 F.2d 928 (2d Cir.), *cert. denied*, 368 U.S. 984 (1961). Thus, particularly in view of the trial court's specific instructions to the jury on the single multiple conspiracy issue and the failure of Sorrentino to except to the charge, the sole question on appeal is whether, when viewed in the light most favorable to the Government, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Arroyo*, 494 F.2d 1316, 1317 (2d Cir.), *cert. denied*, 419 U.S. 827 (1974); *United States* v. *Ross*, 464 F.2d 376, 378 (2d Cir. 1972), *cert. denied*, 410 U.S. 990 (1973); *United States* v. *McCarthy*, 473 F.2d 300, 302 (2d Cir. 1972), the evidence was sufficient for the jury to find that a single conspiracy existed.

The premise upon which Sorrentino's multiple conspiracy claim rests is that, based on the evidence adduced, the jury was required to conclude that by late 1975 Tate had withdrawn as a member of the conspiracy that he had entered into with Sorrentino in late 1974. This premise is faulty.

It is well settled that "[a] conspiracy once established is presumed to continue until the contrary is shown." *United States* v. *Stromberg*, 268 F.2d 256, 263 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959). To establish withdrawal, "[m]ere cessation of activity is not enough . . . there must also be affirmative action, either the making of a clean breast to the authorities . . . or communication of

the abandonment in a manner reasonably calculated to reach co-conspirators. And the burden of establishing withdrawal lies on the defendant." *United States* v. *Borelli*, 336 F.2d 376, 388 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965); *United States* v. *Schwenoha*, 383 F.2d 395, 396-97 (2d Cir. 1967), *cert. denied*, 390 U.S. 904 (1968). See also *United States* v. *Hyde*, 225 U.S. 347, 369 (1912); A.L.I. Model Penal Code (P.O.D.) §§ 2.06(6)(c)(i) and 5.03(6), and discussion thereof in Tent. Draft Nos. 1-3, pp. 37-38 and No. 10, pp. 153-55. Lapes in activity, changes in membership, or shifting locale, without proof of an affirmative act ending the conspiracy, do not transform a single conspiracy into a multiple one. *Braverman* v. *United States*, 317 U.S. 49, 52 (1952); *United States* v. *Panebianco*, Dkt. No. 76-1132, slip op. 119 at 126, 127 (2d Cir., Oct. 14, 1976); *United States* v. *Finkelstein*, *supra*, 526 F.2d at 521; *United States* v. *Cirillo*, 468 F.2d 1233, 1239 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973).

While it is true that Tate periodically stopped purchasing and selling, interruptions of this sort occurred on more than one occasion. *Cf. United States* v. *McGuire*, 249 F. Supp. 43, 49 (S.D.N.Y. 1965, *aff'd*, 381 F.2d 306 (2d Cir. 1967), *cert. denied*, 389 U.S. 1053 (1968). Tate stopped purchasing when he became dissatisfied with the quality of the cocaine, and later when Sorrentino became aware that Tate had short-changed him.* But

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* While "cooperation and trust" as enunciated in *United States* v. *Tramunti*, 513 F.2d 10087 (2d Cir. 1975), *cert. denied*, 423 U.S. 832 (1975), are clearly indicia of common agreement, all need not be sweetness and light among criminals embarked on an illicit joint venture. The fact that one co-conspirator, Tate, from time to time cheated Sorrentino by withholding monies from him does not vitiate the unifying agreement and common aim—the distribution of narcotics—which bound the conspirators together. *United States* v. *Finkelstein*, *supra*, 526 F.2d at 522. See also *United States* v. *Gersh*, 328 F.2d 460 (2d Cir.), *cert. denied*, 397 U.S. 992 (1964)

there was no evidence of an affirmative act of withdrawal. There was no testimony that Sorrentino ever told Tate that he was permanently barred from obtaining cocaine from him or that Tate ever informed Sorrentino that he was out of the business. Compare *United States* v. *Steinberg*, 525 F.2d 1126, 1333-34 (2d Cir. 1975), *cert. denied*, 425 U.S. 971 (1976). Needless to say, neither man made a clean breast of the matter to the authorities. Indeed, the best evidence that there had been no withdrawal was Tate's voluntary return to his old way, when he assisted in arranging the February, 1976 transaction.

Moreover, even assuming that there was some evidence supporting the conclusion that there had been a withdrawal, this was an issue to be decided by the jury, *cf. United States* v. *Panebianco*, *supra*, slip op. at 127-28; *United States* v. *Gonzalez-Carta*, 419 F.2d 548, 551 (2d Cir. 1969), and the jury's view of the matter is best reflected by its verdict.*

C. In Any Event, Sorrentino Suffered No Substantial Prejudice

Assuming *arguendo* the existence of two conspiracies, it does not follow that the judgment of conviction should be reversed. The crucial test is whether there was a *prejudicial* variance between the conspiracy alleged in

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* Even if Tate had withdrawn from the conspiracy at the end of 1975, that would not prove that Sorrentino did not continue to belong to an ongoing conspiracy. See *United States* v. *Panebianco*, *supra*, slip op. at 127. Tate testified that he had brought a number of persons to the bar to purchase from Sorrentino. (Tr. 40). Therefore, even if Tate withdrew in late 1975, it is likely that Sorrentino continued to supply cocaine to the persons introduced to him by Tate. Tate's participation as a conspirator in February 1976 can thus be viewed as a return to a single, continuing conspiracy headed by Sorrentino.

the indictment and the one proved at trial. *United States* v. *Sir Kue Chin*, 534 F.2d 1032, 1035 (2d Cir. 1976), and cases there cited. Admission of evidence of a separate conspiracy would not mandate reversal in the absence of a showing that the error affected the "substantial rights of the accused." See Fed. R. Crim. P. 52(a); *Berger* v. *United States*, 295 U.S. 78, 82 (1935); *United States* v. *Sir Kue Chin*, *supra*; *United States* v. *Miley*, 513 F.2d 1191, 1207 (2d Cir. 1975), *cert. denied*, 423 U.S. 842 (1976), and cases cited therein.

Federal Rule of Criminal Procedure 8(a) provides that two or more offenses can be joined in a single indictment if the offenses charged are of the same or similar character or are based . . . on two or more acts constituting parts of a common scheme or plan." Since here, even if two conspiracies were proved, there was only one defendant, and since Sorrentino was plainly a member of each conspiracy, both conspiracies could properly have been joined in one indictment and tried together. *United States* v. *Sir Kue Chin*, *supra*, 534 F.2d at 1035. Sorrentino "thus could not have been prejudiced by the failure of the indictment to charge two conspiracies rather than one." *Id.*

Furthermore, even if the indictment could properly have charged only the February, 1976 phase of the conspiracy, the proof of the earlier transactions with Tate would have been admissible to clarify Sorrentino's intent when he appeared on the scene on February 12, 1976 and to prove the background, development and purpose of the conspiracy. Fed. R. Evid. 404(b); *United States* v. *Grady*, Dkt. No. 76-1201, slip op. 291, 302 (2d Cir., Oct. 27, 1976); *United States* v. *Stassi*, Dkt. No. 76-1110, slip op. 247, 251 (2d Cir., Oct. 26, 1976); *United States* v. *Flores*, 538 F.2d 939 (2d Cir. 1976); *United States* v. *Natale*, 526 F.2d 1160, 1173-74 (2d

Cir. 1975), *cert. denied*, 425 U.S. 950 (1976); *United States* v. *Torres*, 519 F.2d 723, 727 (2d Cir.), *cert. denied*, 423 U.S. 1019 (1975); *United States* v. *Papadakis*, 510 F.2d 287, 294 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States* v. *Nathan*, 476 F.2d 456, 460 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973); *United States* v. *Colasurdo*, 453 F.2d 585, 591 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972).*

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*Relying on *United States* v. *Kaplan*, 510 F.2d 606 (2d Cir. 1974), Sorrentino argues that the Government is precluded from justifying the admission of the pre-February, 1976 phase of the conspiracy on a similar act theory, because it was not admitted on that theory below. This argument is specious. First, the Government is not arguing that the evidence *should* have been admitted on this theory, only that it *could have been*, and Sorrentino's argument that this is an improper analysis of the issue of prejudice flies in the face of this Court's discussion of the identical issue in *United States* v. *Sir Kue Chin*, *supra*, 534 F.2d at 1035. Second, *Kaplan* is readily distinguishable; for there the trial court had specifically considered and rejected the alternative theory of evidence advanced by the Government on appeal to legitimize the admission of hearsay statements. In the instant case, the Government never offered the disputed evidence under a prior similar acts theory, and the trial court, contrary to the defendant's misleading suggestions, never rejected it. (Br. 11; Tr. 96-99).

Equally unpersuasive is Sorrentino's claim that, had the pre-February, 1976 evidence been admitted on a similar acts theory, he would have received a limiting instruction that would have drastically reduced the uses which the Government made of this evidence. Since any limiting instruction would have permitted the Government to argue from this evidence that it proved the background of the conspiracy and the defendant's intent, it is impossible to see how such an instruction would have affected the uses made of the evidence in the slightest.

Finally, Sorrentino complains that Tate's plea of guilty prior to trial infected his trial. It is difficult to understand what this has to do with his claim of prejudice arising out of multiple conspiracies, but in any event, Judge Weinfeld carefully instructed the jury that:

[Footnote continued on following page]

POINT II

Judge Weinfeld Did Not Err in Admitting Co-conspirator Hearsay Statements Against Sorrentino.

Sorrentino argues that Judge Weinfeld erred in admitting hearsay declarations of Sorrentino's co-conspirator, since the preponderance of evidence, independent of those declarations, was insufficient to support the conclusion that he was a member of the conspiracy. This claim is frivolous.

It is well-settled that hearsay declarations made by one conspirator are admissible against another conspirator if the trial judge finds by a "fair preponderance of the evidence, independent of the hearsay declarations" that the defendant against whom the statements are offered is a member of the conspiracy. *E.g.*, *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970); Fed. R. Evid. 801 (d)(2)(D). In making this preliminary finding of admissibility, the trial judge is afforded a wide discretion, an exercise of which is rarely overturned on appeal. *United States* v. *Ragland*, 375 F.2d 471, 477 (2d Cir. 1967), *cert. denied*, 390 U.S. 925 (1968); *United States* v. *Von Clemm*, 136 F.2d 968, 971 (2d Cir.), *cert. denied*,

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"The Court: You are aware from his testimony that Tate or Alfred Hunter named in the indictment as Richard Tate has pled guilty to the conspiracy count. That was Tate's personal plea of guilty. That fact may not be considered against Sorrentino, nor may any adverse inference be drawn against him by reason thereof. Guilt is personal. The guilt or innocence of the defendant here on trial must be determined solely upon the evidence presented against him or the lack of evidence. *The charges against Sorrentino stand or fall upon the proof or lack of proof as to him and not as to any co-defendant or anyone else.*" (Tr. 134) (emphasis added).

320 U.S. 769 (1943).* Here, it is clear that Judge Weinfeld did not abuse his broad discretion.

First, there can be no doubt that Tate's testimony that Sorrentino had on numerous occasions provided him with cocaine both for his own use and for sale, on a consignment basis, to others provided Judge Weinfeld with more than adequate grounds on which to rest a *Geaney* finding.

Secondly, putting aside the testimony concerning Sorrentino's numerous distributions to Tate, Sorrentino was also linked to the February 12, 1976 sale by his own behavior on that date and the testimony concerning the events leading up to Sorrentino's appearance on the scene. Tate testified that Green made a telephone call to "Louie" inquiring about the availability of cocaine. Green's negotiations with "Louie" plainly were not hearsay, but rather a verbal act. See *United States* v. *Wiley*, 519 F.2d 1348, 1350 (2d Cir. 1975), *cert. denied*, 423 U.S. 1058 (1976); *United States* v. *D'Amato*, 493 F.2d 359, 363-64 (2d Cir. 1974); *United States* v. *Glasser*, 443 F.2d 994, 999 (2d Cir.), *cert. denied*, 404 U.S. 854 (1971); *United States* v. *Nuccio*, 373 F.2d 168 (2d Cir.), *cert. denied*, 387 U.S. 906 (1967); *United States* v. *Annunziato*, 293 F.2d 373, 377 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961).* Green's later arrival at the scene

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* The proof needed to satisfy the fair preponderance test is less than required to justify submitting the charge to the jury. *United States* v. *Calabro*, 449 F.2d 885, 890 (2d Cir. 1971), *cert. denied*, 405 U.S. 928 (1972), and it is well-settled that the non-hearsay evidence may be wholly circumstantial. *United States* v. *Manfredi*, 488 F.2d 588, 596-97 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); *United States* v. *Ragland*, *supra*, 375 F.2d at 477.

* See also Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 Yale L.J. 229, 236 (1922).

of the sale with the cocaine in a car driven by Louis Sorrentino, clearly supported an inference that there was a sinister relationship between the two men. *Cf. United States* v. *Panebianco, supra*, slip op. at 133. These facts coupled with the facts that Sorrentino's first name was Louis; that Sorrentino used a leased car; that he parked the car down the block from the undercover car; and that he quickly pulled away with his lights out as soon as Green reached the undercover car, rendered irresistable the conclusion that Sorrentino was a member of this conspiracy.)

While Sorrentino's guile led him to maintain a low profile in this scheme, the non-hearsay evidence when "viewed not in isolation but in conjunction," *United States* v. *Geaney, supra*, 417 F.2d at 1121, as it must be,* demonstrated by far more than a mere preponderance of the evidence that Sorrentino was a co-conspirator. To argue, as Sorrentino desperately does, that there was no evidence of his knowledge of the illegal scheme nor that he intended to participate in it, is simply to ignore (1) that the trial judge has a right and duty to draw justifiable inferences of fact, see *United States* v. *Taylor*, 464 F.2d 240, 243 (2d Cir. 1972); *United States* v. *Calabro, supra*, 449 F.2d at 890,** and (2) that evi-

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* See also *United States* v. *Cassino*, 467 F.2d 610, 618 n.21 (2d Cir. 1972), *cert. denied*, 410 U.S. 928 (1973); *United States* v. *Monica*, 295 F.2d 400, 401 (2d Cir. 1961), *cert. denied*, 368 U.S. 953 (1962).

** There is no requirement that the inferences relied upon by the Government be compelled by the evidence or that the evidence foreclose all inferences supporting innocence. *Holland* v. *United States*, 348 U.S. 121, 139-140 (1954); *United States* v. *Bohle*, 475 F.2d 872, 875 (2d Cir. 1973); *United States* v. *Taylor, supra*, at 244; *United States* v. *Grunberger*, 431 F.2d 1062, 1066 (2d Cir. 1970). *See also United States* v. *Pfingst*, 477 F.2d 177, 197 (2d Cir.), *cert. denied*, 412 U.S. 941 (1973). As this Court recently reaffirmed, "The prosecution . . . is under no duty to negate all possible innocent inferences from a set of circumstanial facts. . . ." *United States* v. *Singleton*, 532 F.2d 199, 203 (2d Cir. 1976).

dence of guilty knowledge, viewed as a whole, acquires a significance beyond that of its component parts. See *United States* v. *Bottone*, 365 F.2d 389, 392 (2d Cir.), *cert. denied*, 385 U.S. 974 (1966); *United States* v. *White*, 124 F.2d 181, 185 (2d Cir. 1941).

Clearly, Judge Weinfeld did not abuse his discretion in finding that the Government had proven Sorrentino's unlawful and knowing participation in this scheme by a fair preponderance of the non-hearsay evidence.

POINT III

Sorrentino Was Not Denied His Sixth Amendment Right to Confrontation.

Relying on *United States* v. *Puco*, 476 F.2d 1099 (2d Cir. 1973), *cert. denied*, 414 U.S. 844 (1973), Sorrentino contends that, in admitting the hearsay statements of co-conspirator Green into evidence, Judge Weinfeld deprived him of his Sixth Amendment right of confrontation. This claim is meritless.

In *United States* v. *Puco*, a panel of this Court in a 2 to 1 decision suggested that in light of the Supreme Court's decision in *Dutton* v. *Evans*, 400 U.S. 74 (1970), before a co-conspirator's statement was offered without producing him, the trial judge should "determine whether, in the circumstances of the case, that statement bears sufficient indicia of reliability to assure the trier of fact an adequate basis for evaluating the truth of the declaration in the absence of cross-examination." 476 F.2d at 1107. The panel went on to state that in most cases, a determination that the statement was in furtherance of the conspiracy and that the defendant had been shown

to be a member of the conspiracy by a fair preponderance of the non-hearsay testimony would provide sufficient indicia of reliability. 476 F.2d at 1107-08.*

It has been the Government's position since *Puco* that, despite the panel's 2 to 1 decision, no separate finding of "indicia of reliability" should be required. See dissenting opinion of Lumbard, J., on petition for rehearing, 476 F.2d at 1108, and dissenting opinion of Friendly, Ch. J., joined in by Timbers and Hayes, C.J.J. on petition for rehearing *en banc*, *id.* at 1111. See also *United States* v. *Cohen*, 489 F.2d 945, 950 (2d Cir. 1973). But in any event, even under the view of the panel's majority, the statements of Green, like virtually every statement in furtherance of a conspiracy, do bear such indicia of reliability.

Green's statements to Tate that Sorrentino was the source of the cocaine were against his penal interest. See *United States* v. *D'Amato*, *supra*, 493 F.2d at 365. In addition, the statements were made by one co-conspirator to another. As this Court held in *United States* v. *Mallah*, 503 F.2d 971, 980 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975):

> "[W]here the declarant and the listener know each other to be members of the conspiracy at the time the statement is made, there is no reason to doubt the veracity of the testimony, and *Puco* does not bar its admission."

Indeed, it would be all but incredible to believe that Green would seek to deceive his roommate Tate about the source of the drugs.

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* The Court explicitly rejected the suggestion that co-conspirator hearsay would be inadmissible if "crucial" to the Government's case or "devastating" to the defense. *Id.* at 1107. See also *United States* v. *Manfredi*, *supra*, 488 F.2d at 596.

Equally reliable were Green's statements to the undercover agent and informant that "Louie" was the source of the cocaine and was physically "behind" them when the cocaine was delivered. First, the statements were confirmed by Green's statements to Tate to the same effect and by all of Tate's prior dealings with Sorrentino. Secondly, Sorrentino's actions were wholly consistent with Green's utterances. Shortly after Green left to obtain the cocaine from "Lou" he returned in a rented car driven by Sorrentino. Sorrentino parked the car down the block from the undercover car and, after Green reached the undercover car to consummate the sale, Sorrentino quickly pulled away, with the lights of his car off.* See *United States* v. *Santana*, 503 F.2d 710, 717 (2d Cir.), *cert. denied*, 419 U.S. 1053 (1974), 420 U.S. 963 and 1006 (1975).

Perhaps realizing the weakness of his claim, Sorrentino contends that the testimony concerning Green's statements was unreliable, because the witnesses who testified to Green's utterances—Tate and the informant—had motives to testify falsely. (Br. at 28-29). What Sorrentino conveniently ignores is that he had an opportunity to confront the witnesses to show that they were not accurately testifying to what Green had said. Therefore, his confrontation claim is limited only to challenging the reliability of Green's utterances, not the wit-

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* Sorrentino contends that Green had a motive to lie about the existence of Sorrentino—an Italian source—because, by conveying the impression that he and Tate were mob-connected to the prospective purchasers of the drugs, they could prevent a rip-off. (Br. at 28). This argument might arguably explain Green's statements to the undercover agent and informant that Sorrentino was the source of the drugs and close at hand at the time of the sale, but it does not begin to explain Sorrentino's actions on the night of February 12, 1976 or why Green also told Tate that Sorrentino was the source.

nesses who testified to them. As the Supreme Court noted in *Dutton* v. *Evans*, *supra*, 400 U.S. at 88 (footnote noted):

> "The hearsay rule does not prevent a witness from testifying as to what he has heard; it is rather a restriction on the proof of fact through extrajudicial statements. From the viewpoint of the Confrontation Clause, a witness under oath, subject to cross-examination, and whose demeanor can be observed by the trier of fact, is a reliable informant not only as to what he has seen but also as to what he has heard."

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Raymond Levites

being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the sixth day of January, 1977, he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Paul Rao Jr.
Attorney at Law
233 Broadway
New York 10007 New York

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Raymond Levites

Sworn to before me this

6th day of 1977

Lawrence Farkash

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Notary Public, New York State
No. 24-4606580
Qualified in Kings County
Comm. Expires March 30, 1977